



In re Estate of Omwitakho Mutachi (Deceased) (Succession Cause 144 of 2000) [2023] KEHC 19223 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 144 OF 2000**

DK KEMEL, J

JUNE 21, 2023

IN THE MATTER OF THE ESTATE OF OMWITAKHO MUTACHI

.....**DECEASED**

BETWEEN

JOSEPHINE NAMBIRO MWITAKHO PETITIONER

AND

PHANICE NYAMANGA MUSOTSI 1ST RESPONDENT

RACHAEL MUSOTSI 2ND RESPONDENT

LILIAN MUSOTSI 3RD RESPONDENT

TABITHA MUSOTSI 4TH RESPONDENT

CECILIA MUSOTSI 5TH RESPONDENT

AND

LAWRENCE MUSALA MUSOTSI INTERESTED PARTY

FREDRICK MUKA MALALA INTERESTED PARTY

DOMINIC MWITAKHO SHIKHUNYI INTERESTED PARTY

RULING

1. The Interested parties herein have filed an application dated January 30, 2023 seeking the following reliefs namely;
 - (a) That the applicants herein be enjoined in this suit as interested parties.



- (b) That this court be pleased to stay the execution of the decree extracted from the judgement delivered by Lady Justice Ali Aroni on March 16, 2017 and all consequential orders pending the determination of the application.
 - (c) That the *status quo* on land parcel number North Wanga/Mayoni/1764, North Wanga/Mayoni/1765 and North Wanga/Mayoni/1766 be maintained pending determination of the application.
 - (d) Costs of the application be provided.
2. The Application was supported by the grounds on the face of the application as well as the supporting affidavit of Lawrence Musala Shikhunyi, the 1st Interested applicant. The Applicants' grievance is *inter alia*; that the Applicants are grandchildren of the deceased herein, that the 1st Respondent herein has no capacity to inherit land belonging to her husband who died in 1980 after she abandoned her matrimonial home and remarried elsewhere; that the 1st Respondent's children have already been taken care of by their paternal grandmother who held the share in trust for them; that the Applicants have already been allocated their portions which they occupy to date; that the 1st Respondent withheld information from Justice Aroni by failing to disclose that another judgement had been delivered in Kakamega High Court via Misc Application Number 118 of 2009; that the 1st Respondent has been moving from one court to the other with the sole aim of disinheriting the applicants from the ancestral land; that the 1st Respondent had deserted her matrimonial home several years ago and has no authority to claim land which she had deserted.
3. The 1st Respondent filed a replying affidavit sworn on February 25, 2023 wherein she deposed *inter alia*; that the applicants have no *locus standi* to bring the present application in respect of the estate of the deceased herein who is their paternal grandfather yet their parents fully participated in the succession proceedings and hence it is only their parents who can litigate in these proceedings; that the Applicants' parents were duly provided for in the estate of the deceased as per the evidence tendered herein leading to the judgement by Aroni Judge (as she then was) dated 16/3/17; that the Applicants have come to this court with unclean hands as they have interfered with the share due to the 1st Respondent and her children; that the Applicants seek to overturn the judgement of Hon Justice Abida Ali Aroni (as she then was) dated March 16, 2017 yet their parents had lodged an appeal to the Court of Appeal which was later dismissed for non-appearance; that the matters raised herein ought to have been canvassed at the Court of Appeal and not in this forum; that the Applicants have not disclosed that the Petitioner herein is their father and who had lodged an appeal to the Court of Appeal vide Appeal No 56 of 2017 which was later dismissed on the October 18, 2021 for want of appearance; that the Applicants if dissatisfied by the judgement of this court should challenge the same vide Appeal No 56 of 2017 lodged by their father Gerald Shikhunyi at the Court of Appeal; that the matters raised by the Applicants are the same ones that had been advanced by their father Gerald Shikhunyi in the objection proceedings which were determined vide the judgement dated 16/3/2017; that the Applicants have rushed to court following the 1st Respondent's intention to execute the judgement.
4. The 2nd Respondent also filed a replying affidavit sworn on February 25, 2023 on her own behalf and on behalf of the 3rd -5th Respondents where she averred *inter alia*; that they are biological daughters of one Protus Musotsi Mwitakho who was the last born son of the deceased herein from the first wife Josephine Nambiro Mutachi while the 1st Respondent is their mother; that this court has already pronounced itself in its judgement dated March 16, 2017 and hence it cannot sit as an appeal against its own judgement; that this court cannot sit to review its judgement as the applicants are beneficiaries of an illegality which the court pronounced itself in its judgement when it ordered that they be deregistered as proprietors of the parcels of land which is to revert back to the estate of the



deceased and eventually allocated to the Respondents; that the Applicants had been ably represented in the objection proceedings herein by the petitioner Gerald Shikhunyi who is their father and hence the claim that they were not heard is false.

5. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions. They are mainly a reiteration of their averments in their rival affidavits.
6. I have given due consideration to the Applicants application dated January 30, 2023 together with the rival submissions. It is not in dispute that this court rendered a judgement dated March 16, 2017 involving the 1st Respondent herein as an objector and Applicant's father Gerald Shikhunyi Mwitakho who was the Petitioner. It is not in dispute that the said Gerald Shikhunyi Mwitakho subsequently lodged an appeal at the Court of Appeal at Kisumu vide Civil Appeal No 56 of 2017. It is not in dispute that the said Civil Appeal was dismissed for non-appearance with costs to the 1st Respondent on the October 18, 2021. That being the position, the issue for determination is whether the present application has merit.
7. The Applicants gravamen is that they have been allocated portions of the properties pursuant to the confirmation of grant and that the execution of the judgement dated March 16, 2027 will greatly prejudice them as they are likely to be evicted from the parcels of land. Indeed, vide the said judgment, all the new titles created were cancelled and distributed to the 1st Respondent and her children (2nd -5th Respondents). Even though the Applicants might be having genuine concerns as interested parties, I find that they have approached the staple after the horses have bolted. Upon the delivery of the judgement, the then petitioner Gerald Shikhunyi Mwitakho moved to the Court of Appeal where he lodged Civil Appeal No 56 of 2017 at Kisumu. The same was thereafter dismissed for non-appearance on October 18, 2021.

That being the position, this court ceased to have jurisdiction to entertain anything related to the judgment now appealed against. The court became functus officio. Further, this court must resist the invitation by the Applicants to entertain them in this court since the court cannot sit as an appeal court in its own judgement. The Applicants have admitted that the case went to the Court of Appeal but they have not explained why they have approached this court despite knowledge that the matter has already been escalated to the Court of Appeal., It is clear that they have chosen the wrong forum to agitate their case. It seems to me that the Applicants, having leant of the dismissal of the appeal by the Court of Appeal, devised an ingenious way of approaching this court as interested parties yet they had all along been aware that the petitioner Gerald Shikhunyi Mwitakho had been representing their interests up to the Court of Appeal. Indeed, during the objection proceedings herein, the said petitioner carried and defended the interests of the Applicants herein and hence they ought to pursue the said interests in the Court of Appeal. If as they claim, that the petitioner is now deceased, they should take up letters of administration in respect of the estate of the deceased petitioner and thereafter move the Court of Appeal appropriately. It is my considered view that the application herein is an abuse of the court process and meant to frustrate the 1st Respondent and her children from enjoying the fruits of the judgement dated March 16, 2017.

8. In the upshot, it is my finding that the Applicants application dated January 30, 2023 lacks merit. The same is dismissed. As the matter involves family members, I make no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JUNE 2023.

D KEMEI

JUDGE.

In the Presence of:-



Lawrence M. Musotsi 1st Applicant
Fredrick M Mulala 2nd Applicant
Dominic M Shikhunyi 3rd Applicant
No appearance EShinyala for Respondents
Kizito Court Assistant.

